



# OLR RESEARCH REPORT

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## **BANNING CIGARETTE SALES BY PHARMACIES**

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You asked whether (1) municipalities have the authority to ban cigarette sales in pharmacies and (2) any municipalities have banned such sales or the sales of other products. You also requested a discussion of the (1) potential issues if a municipality adopted such a ban and (2) arguments for and against such bans.

The Office of Legislative Research is not authorized to provide legal opinions and this report should not be considered one.

### **SUMMARY**

It is unclear whether municipalities have authority to ban the sale of cigarettes in pharmacies. The state Supreme Court, in *Modern Cigarette, Inc. v. Town of Orange* (2001) 256 Conn. 105, upheld the right of municipalities to bar cigarette vending machines, which suggests they could also ban pharmacies from selling cigarettes. However, the ordinance the case upheld sought to discourage tobacco sales to minors, although it affected adults as well, cigarette sales to minors is prohibited by state law. In contrast, there is no state law restricting cigarette sales in pharmacies.

In addition, it is not clear whether the state has demonstrated its intent to occupy the field of where cigarettes can be sold or activities that pharmacies can perform, thus demonstrating that it intends to preempt local efforts to regulate cigarette sales by pharmacies. The other legal issues such a ban might raise are whether it would violate the Equal Protection and Interstate Commerce clauses of the U.S. Constitution.

We are not aware of any Connecticut municipality that has banned the sale of cigarettes at pharmacies, although South Windsor is considering a ban. Similar bans have been adopted in [32](#) Massachusetts municipalities, including Boston and Worcester, as well as Richmond County and San Francisco, California.

In Connecticut, Groton, Milford, and Norwich have adopted ordinances modeled on Orange's ban on sales of cigarettes from vending machines. West Hartford bans such sales except at veteran's associations. New Haven and West Haven ban the sale of spray paint to minors and Southington bans the sale of the novelty item Silly String. Ridgefield bans the sale of fireworks and Bethel bans the sale of guns to minors. Westport bars grocery stores, restaurants, and certain other retailers from providing certain plastic bags, and Darien is considering a similar ordinance.

The primary arguments for a municipal ban are that it could reduce (1) smoking by making cigarettes somewhat harder to purchase, thereby reducing the health costs of smoking and (2) access to cigarettes by minors. The primary arguments against such a ban that would (1) reduce consumer choice on where to buy cigarettes, (2) likely have a limited effect on cigarette sales, and (3) decrease revenues for pharmacies and the state.

## **AUTHORITY TO BAN CIGARETTE SALES IN PHARMACIES**

A municipality's authority to ban cigarette sales in pharmacies depends on how the courts construe the municipal powers laws and whether the state has done things to preempt local actions. In general, the law gives municipalities broad police powers to protect public health and welfare. [CGS § 7-148](#), among other things, allows municipalities to:

1. regulate the mode of using any buildings when this seems expedient to promote the safety, health, morals and general welfare of the municipality's inhabitants;

2. regulate and prohibit the carrying on any trade, business or profession in the municipality that is, or may be, so carried on as to become harmful to public health; and
3. provide for the health of the municipality's inhabitants and do all things necessary or desirable to secure and promote the public health.

The courts have consistently held that the powers of municipalities are limited. Nearly 150 years ago, the state Supreme Court held that towns have no powers except those that are granted to them by the legislature. *Webster v. Town of Harwinton* (1864) 32 Conn. 118. A century later, the court held that a city, being a "creature of the state," could exercise no powers except those that were expressly granted to it or are necessary for it to discharge its duties and accomplish the objects and purposes of its creation. *Bredice v. City of Norwalk* (1964) 152 Conn. 287. The test of whether a power is implied is whether it is necessary to exercise an explicit power, not whether it is merely convenient. *Fahy v. Town of Trumbull* (1960) 22 Conn. Supp. 105.

State actions could also prevent municipalities from banning cigarette sales at pharmacies. A local ordinance is preempted by state statute if (1) the legislature has demonstrated an intent to occupy the entire field of regulation on the matter or (2) the ordinance irreconcilably conflicts with the statutes. *Di Pietro v. Zoning Board of Appeals of City of Milford* (2006) 93 Conn. App. 314, certification denied 277 Conn. 925. While it does not appear that any statute directly conflicts with such an ordinance, the law authorizes the state, rather than municipalities, to regulate pharmacies. [CGS §§ 20-570 to 20-630](#), the Pharmacy Practice Act, requires pharmacies as well as pharmacists to be licensed by the Department of Consumer Protection. The state also specifically bars sales of cigarettes to minors.

In *Modern Cigarette, Inc. v. Orange*, the court upheld a ordinance adopted by Orange that banned cigarette vending machines town-wide, finding that it was not preempted by a state law ([CGS § 12-289a](#)) that regulated such machines (OLR report [2001-R-0462](#) summarizes the decision.) The court found that the ordinance was an exercise of the police power granted to the town by statute. It held that:

...merely because a local ordinance, enacted pursuant to the municipality's police power, provides higher standards that a statute on the same subject does not render it necessarily inconsistent with state law. Whether a conflict exists depends on whether the ordinance permits or licenses that which the statute forbids, or prohibits that which the statute authorizes. *Modern Cigarette* at 120

One substantive difference between the ordinance upheld in *Modern Cigarette* and a ban on pharmacies selling cigarettes is their purpose. The Supreme Court found that "the *sole* purpose of this ordinance is to prevent *minors*, those persons who are *not* legally permitted to use tobacco products, from obtaining them via vending machines" (*Modern Cigarette* at 121, emphasis in original). The court had found that, prior to the ordinance's adoption, even when buyers had to obtain a token from an adult to use the machine or the machine was visible to an adult, minors were routinely able to buy cigarettes from them. In contrast a ban on pharmacy sales would also affect adults, who are legally allowed to buy cigarettes.

Another Supreme Court case, *Dwyer v. Farrell* (1984) 193 Conn. 7, suggests that municipalities might not be authorized to prohibit cigarette sales at pharmacies. In this case, the court overturned a local ordinance that limited the retail sales of handguns to sales by licensed firearms dealers in areas zoned for business. The court ruled that [CGS § 29-28](#) permitted otherwise qualified sellers who were not dealers to sell handguns in residential as well as business zones.

## **POTENTIAL ISSUES**

### ***Constitutional Issues***

In addition to being authorized by state law, a local ordinance must conform to the U.S. Constitution. An ordinance barring pharmacies, but not other businesses, from selling cigarettes might be challenged as violating the Equal Protection Clause of the U.S. Constitution, which applies to states through the fourteenth Amendment. The clause requires states and their subdivisions to treat their residents equally. If a state or subdivision treats one group differently than another, it must be able to articulate a reasonable basis for doing so. For example, pharmacies might challenge the ordinance since it would not apply to grocery stores or other places where people routinely buy cigarettes. This happened in San Francisco, where Walgreens challenged the local ordinance because it initially did not apply to pharmacies in grocery or "big box" stores. A state court ruled in favor of Walgreens, and the city subsequently expanded the ordinance to include all pharmacies.

Subsequently, in *Safeway v. City and County of San Francisco*, 797 F.Supp.2d 964 (2011), the Safeway grocery chain challenged the expanded ban, saying that the law unfairly allows other retailers that do not have pharmacies to sell tobacco while Safeway may not. Safeway argued that this distinction violated the U.S. and California Constitutions' Equal Protection clause. In July 2011, the federal court dismissed the lawsuit, ruling that San Francisco's law is a reasonable and permissible use of its regulatory power. The court's decision is available at: <http://www.courthousenews.com/2011/07/19/safeway.pdf>

A ban on cigarette sales by pharmacies might also be challenged as violating the Commerce Clause of the U.S. constitution. The clause authorizes the federal government to regulate interstate commerce and has been interpreted to bar states (and by extension municipalities) from adopting laws that interfere with interstate commerce.

### ***Other Issues***

In addition to the potential legal issues, a municipality considering banning cigarette sales in pharmacies would need to determine whether it would apply to all pharmacies, including those located in grocery and "big box" stores or just those that operate on a stand-alone basis. It would also have to determine who would enforce the ordinance (e.g., police officers, health department staff, or others).

## **ARGUMENTS FOR AND AGAINST A BAN**

### ***Arguments For A Ban***

A primary argument for a ban is that it could discourage smoking by making it less convenient to buy cigarettes. Consumers going to pharmacies intending to buy cigarettes and other items would need to make a separate trip to buy cigarettes, and the added time and expense of doing so might, to a limited extent, reduce cigarette purchases. Smoking is related to a wide range of health effects, and reducing smoking reduces health care costs borne by the smoker, his or her family, and the public.

Banning cigarette sales in pharmacies would also help enforce the law banning sales of cigarettes to minors. In practice, pharmacies often take steps to bar cigarette sales by minors, such as placing the cigarettes behind sales counters. However, these measures can be avoided with the collusion of sales clerks or by shoplifting. Barring all sales of cigarettes by pharmacies could reduce the opportunity for minors to obtain cigarettes.

Proponents of such bans also argue that it is a conflict of interest for pharmacies to sell cigarettes, which increase the likelihood of heart- and lung-related illnesses, and products meant to treat these illnesses. They also believe that allowing a pharmacy to sell cigarettes sends a mixed message about cigarettes and health. In 1970, the American Pharmaceutical Association stated that mass display of cigarettes in pharmacies is in direct contradiction to the role of a pharmacy as a public health facility.

### ***Arguments Against A Ban***

Adults may legally buy cigarettes, and barring pharmacies from selling them limits consumer choice. Moreover, since consumers could buy cigarettes at a wide range of other establishments, the ban would likely have a limited effect on cigarette sales.

To the extent the ban did reduce cigarette sales, it would reduce revenues for pharmacies and the state (through the cigarette tax). The lack of availability of cigarettes in pharmacies might encourage some consumers to go to retailers in other states if they live near the state's boundaries.

In opposing the San Francisco ordinance, Walgreens argued it would force smokers to buy cigarettes at retailers, such as liquor stores, that do not carry smoking cessation products or have pharmacists available for advice on how to quit smoking.

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